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Supreme Court of the United States

October Term, 1969

No. 331

MICHAEL J. KRAUS,
Petitioner,

v.

SELECTIVE SERVICE SYSTEM LOCAL 25,
Baltimore District, Maryland; and
COLONEL JAMES L. HAYS, as Director of the
Selective Service System for the
State of Maryland; and
LT. GENERAL LEWIS B. HERSHEY,
as National Director of the
Selective Service System,
Respondent.

Petition for a Writ of Certiorari to Review a Judgment of the United States Court of Appeals for the Fourth Circuit

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IN THE

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v.

SELECTIVE SERVICE SYSTEM LOCAL 25,
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COLONEL JAMES L. HAYS, as Director of the
Selective Service System for the
State of Maryland; and
LT. GENERAL LEWIS B. HERSHEY,
as National Director of the
Selective Service System,
Respondent

Petition for a Writ of Certiorari to Review a Judgment of the United States Court of Appeals for the Fourth Circuit

Petitioner Michael J. Kraus prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on March 13, 1969

Opinions Below.

The decision of the United States District Court for the District of Maryland is unreported. It is set out in Appendix A, infra, pp. 1–15. The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 408 F.2d 622 and is set out in Appendix B, infra., pp. 16–22.

Jurisdiction.

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 13, 1969. On June 11, 1969, Mr. Chief Justice Warren entered an order extending until July 11, 1969, the time for filing this petition for writ of certiorari. Jurisdiction is conferred on this Court by 28 U.S. Sec. 1254(1).

Questions Presented.

Petitioner, age 32, an Assistant History Professor in the History Department of Antioch College, Yellow Springs, Ohio, married and the father of three children, was classified III-A and deferred from training and service in the Armed Forces under Section 6(h)(1) or 6(h)(2) of the Military Selective Service Act of 1967 [50 App. U.S.C. Sec. 456(h)(1) or 456(h)(2)]. Upon returning his Selective Service Notice of Classification card to the government as a statement of protest against the war in Vietnam, petitioner was declared delinquent under Selective Service Regulations, stripped of his deferment, reclassified I-A and ordered to report for induction. Under these circumstances:

1. Is pre-induction judicial review precluded by Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U.S.C. Sec. 460(b)(3)] to a registrant entitled to a presidentially authorized statutory deferment under Section 6(h)(1) or 6(h)(2) of the Military Selective Service Act of 1967 [50 App. U.S.C. Sec. 456(h)(1) or 456(h)(2)?

2. Does Section 10(b)(3) of the Military Selective Service Act of 1967 [50 App. U.S.C. Sec. 460(b)(3)] preclude judicial review of petitioner's punitive reclassification and order to report for induction prior to criminal prosecution or post induction review by way of habeas corpus?

3. Does the declaration of delinquency, punitive reclassification, and induction of petitioner for failure to have his Notice of Classification card in his personal possession, violate the First Amendment, the due process clause of the Fifth Amendment, the Sixth Amendment, the Military Selective Service Act of 1967, and the Selective Service Regulations?

4. Does Selective Service Regulation 1623.5 [32 C.F.R. 1623.5], which requires each Selective Service Registrant to have in his personal possession at all times his Notice of Classification card, both on its face and as construed and applied in this case, and Selective Service Regulation 1642.4 [32 C.F.R. Sec. 1642.4] on its face and as contrued and applied in this case, violate the First Amendment; and do the said Regulations constitute an act of authority undelegated by Congress to the Selective Service System?

Statutes and Regulations Involved.

Military Selective Service Act of 1967, Sec. 10(h)(3) [50 App. U.S.C. Sec. 460(h)(3)] is set out in the Appendix C, infra, p. 23.

Military Selective Service Act of 1967, Sec. 6(h)(1) [50 App. U.S.C. Sec. 456(h)(1)] is set out in Appendix D, infra, p. 24.

Military Selective Service Act of 1967, Sec. 6(h)(2) [50 App. U.S.C. Sec. 456(h)(2)] is set out in Appendix E, infra., p. 26.

Selective Service Regulation 1622.30 [32 C.F.R. Sec. 1622.30] is set out in Appendix F, infra., p. 29.

Selective Service Regulation 1623.5 [32 C.F.R. Sec. 1623.5] is set out in Appendix G, infra., p. 32.

Selective Service Regulation 1631.7 [32 C.F.R. Sec. 1631.7] is set out in Appendix H, infra., p. 33.

Selective Service Regulation 1642.4 [32 C.F.R. 1642.4] is set out in Appendix I, infra., p. 36.

Selective Service Regulation 1642.12 [32 C.F.R. 1642.12] is set out in Appendix J, infra., p. 37.

Statement of the Case.

At the time petitioner originally registered with the Selective Service System, he was a resident of the State of

Maryland and subject to the jurisdiction of Local Board 25 of the State of Maryland. Petitioner, after completing undergraduate studies at Loyola College and doing graduate work at Cornell University in Ithica, New York, accepted in 1963 a position as an assistant history professor in the History Department of Antioch College in Yellow Springs, Ohio. Petitioner has since 1963 remained on the faculty of Antioch College in the History Department.

Petitioner is 32 years of age, married and living with his wife and three children. He was accordingly classified III-A on January 21, 1966, by the Baltimore District Selective Service System Local Board 25. On February 19, 1968, petitioner returned his Notice of Classification card, SSS Form 110, to Local Board 25 solely for the purpose of stating his objection and dissent from any manner of participation to his country's involvement in the war in Vietnam. In a letter addressed to Local Board 25 together with his Notice of Classification petitioner stated, in part:

> "Please find enclosed my Notice of Classification card, which I refuse to carry until such time as my country puts an end to its criminal war against the people of Vietnam . . ."

As a result of this action, and not withstanding that no change in petitioner's status had occurred with respect to his being married and his living with his wife and three children, petitioner was declared deliquent by Local Board 25 on March 1, 1968. A copy of his Deliquency Notice is set out in Appendix K, infra., p. 38. On the same day, petitioner was reclassified I-A and was mailed a notice of such classification by the Local Board. On May 23, 1968, petitioner was sent an Order to Report for Induction at Baltimore, Maryland, on

June 19, 1968, a copy of which is set out in Appendix L, infra., p. 39.

These actions by Local Board No. 25 were in line with a memorandum and letter dated respectively October 24 and October 26, 1967, from the Director of Selective Service. This memorandum and letter (set forth in Appendix O, infra., p. 43), addressed to all local Selective Service Boards, advised local boards, among other things, to deny deferments to any registrant who takes part in "any action that violates the Military Selective Service Act." The declaration of petitioner as a delinquent and his reclassification to I-A by the respondent Local Board was clearly in implementation of General Hershey's instructions. The letter from General Hershey directed local boards to act on the basis of information received concerning so-called "illegal" demonstrations involving registrants such as the petitioner, on the strength of which classifications were to be re-opened, the registrant classified anew, "and if evidence of violation of the Act and Regulations is established, also to declare the registrant to be a delinquent and to process him accordingly."

Petitioner responded to the Order to Report for Induction by letter of May 30, 1968, a copy of which is set out in Appendix M, infra., p. 40. Petitioner's request to have his file transferred to an Ohio board was, pursuant to Selective Service Regulations, denied by letter of June 4, 1968 from petitioner's Maryland Selective Service System Local Board. A copy of this letter is set out in Appendix N, infra, p. 42.

Subsequently, and in order to complete his teaching assignment for the semester at Antioch College, petitioner

requested and was granted an extension of his date for induction until July 8, 1968. Having completed his duties at Antioch College, petitioner, sometime during the first week of July, 1968, did travel to Baltimore for the purpose of obtaining local counsel to take action on his behalf with regard to the pending induction. On July 5, 1968, counsel notified the District Court of their intention to immediately file a complaint on behalf of petitioner. That same afternoon, it was arranged that petitioner's induction be postponed until July 12, 1968, pending a hearing and ruling on the complaint in the premises. Petitioner sought a judgment that the declaration of his delinquency and his reclassification were null and void and an injunction against his induction into the armed forces. Petitioner further sought to have declared unconstitutional the Military Selective Service Act of 1967 as applied and Selective Service Regulations 1623.5, 1642.4 and 1642.12 of Title 32 C.F.R. and made application that a Three Judge Court be convened. Respondents moved to dismiss the complaint and in opposition to the convocation of a Three Judge Court. The matter was heard before His Honor, R. Dorsey Watkins, on July 10, 1968, and induction was further postponed pending disposition by the court.

Decision was rendered on July 16, 1968, at which time the Court granted the defendants' Motion to Dismiss Petitioner's Complaint and denied petitioner's Application for Convocation of Three Judge Court. It was then arranged and later ordered that petitioner's induction be stayed pending appeal before the United States Fourth Judicial Circuit Court of Appeals.

Appeal from the decision of the District Court was duly noted and thereafter the case was argued before the United

States Court of Appeals for the Fourth Circuit on January 10, 1969. On March 13, 1969, the Court of Appeals affirmed the judgement below.

Petitioner received on April 2, 1969, a Notice to Report for Induction on April 17, 1969. On April 11, 1969, the United States Court of Appeals for the Fourth Circuit ordered that the defendants be enjoined from inducting petitioner into the armed services pending a timely application by petitioner to the Supreme Court for an additional stay of induction. On May 19, 1969, it was ordered by Mr. Chief Justice Warren that a Stay of Induction be granted petitioner pending the timely filing of a Petition For Writ Of Certiorari. On June 11, 1969, Mr. Chief Justice Warren entered an order extending until July 11, 1969, the time for filing this Petition For Writ Of Certiorari.

Reasons for Granting the Writ.[1]

Introduction.

Certiorari should be granted in this case because the consititutional and statutory questions here involved affect a great and growing number of young Americans who are subject to the rules and regulations of the Selective Service System and who must face the imposition of various penalties and burdens as a result of their expressing their opposition to this country's involvement in Vietnam, an expression protected by rights granted under the First Amendment to our Constitution.

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[1] The case of *Breen v. Selective Service Local Board No. 16*, in the Supreme Court, ~~Case No. 1144, October Term, 1968~~, in which certiorari has been granted, is on all-fours with Petitioner's case. Since the points to be considered in Petitioner's case are essentially the same as those raised in the Petition for Writ of Certiorari in *Breen*, Petitioner has borrowed substantially from the *Breen* Petition.

Consolidated, October, 1969

Pursuant to a directive from General Hershey, contained in the form of a letter together with a Local Board Memorandum[2], from General Hershey as Selective Service Director, there have been many young men who have been reclassified from an exempt or deferred classification to an I-A classification. General Hershey's directive of October, 1967, threatens war protestors, by means of reclassification into a delinquent status, with loss of their draft deferments and with immediate induction into the armed forces.

The letter and memorandum addressed to all members of the Selective Service System " . . . asserts that since 'any action' violative of the Selective Service Act, regulations, or 'related processes' is patently contrary to the national interest, registrants who commit such actions 'should be denied deferment in the national interest.' In addition, it condemns 'illegal activity which interferes with recruiting or causes refusal of (military) duty' as 'not by any stretch of the imagination' compatible with the national interest. It goes on to declare that

> 'Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other segment of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

[2] Text published in the New York Times, November 9, 1967.

> A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew, and if evidence of violation of the act and regulations is established . . . also . . . declare the registrant to be delinquent and . . . process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

The letter concludes by urging

> all elements of the Selective Service System . . . to expedite responsive classification and the processing of delinquents to the greatest possible extent consistent with sound procedure.

Local Board Memorandum No. 85,[1] apparently attached to this letter, instructs local boards to forward any abandoned or mutilated draft card they might receive to the owner's draft board and informs the recipient board how it should go about declaring the owner delinquent.

The delinquency regulations provide in pertinent part that

> whenever a registrant has failed to perform any duty or duties required of him under the selective service law (other than certain designated duties) . . . the local board may declare him to be delinquent.

32 C.F.R. § 1642.4(a) (1968). A delinquent registrant may be classified 1-A and if he is, should be moved to the head of his group. See 32 C.F.R. §§ 1642.12, 1642.13, 1631.7 (1968).

[1] Selective Service Memorandum No. 85, dated July 21, 1967, at pp. 2 and 3.

A. Certiorari should be granted because the decision below conflicts with this Court's decision in *Oestereich v. Selective Service Local Board No. 11*, 37 U.S.L. Week 4053.

In its decision in Oestereich, this Court characterized the use of the delinquency procedure in the circumstances of that case as "basically lawless" and a "clear departure" by the Local Selective Service board from its mandate.

The Court also noted that even if the Congress had authorized local boards to revoke Selective Service exemptions through the use of delinquency procedures: "serious questions would arise if Congress were silent and did not prescribe standards to govern the boards' actions." 37 U.S.L. Week at 4054.

Oestereich stands for two propositions: First: that delinquency reclassification is unlawful if the registrant involved qualifies for a statutory exemption, and, second, that a bona-fide claim of such an unlawful reclassification is entitled to pre-induction judicial review despite the language of Section 10(b)(3). As was stated by the Court, ibid.

> "... But Congress did not define delinquency; nor did it provide any standards for its definition by the Selective Service System. Yet Selective Service, as we have noted, has promulgated regulations governing delinquency and uses them to deprive registrants of their statutory exemption, because of various activities and conduct and without any regard to the exemptions provided by law.
>
> "We can find no authorization for that use of delinquency. Even if Congress had authorized the

> Boards to revoke statutory exemptions by means of delinquency classifications, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions. There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption. So to hold would make the Boards freewheeling agencies meting out their brand of justice in a vindictive manner.
>
> "Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption. . . ."

In *Clark v. Gabriel*, 37 U.S.L. Week 3217, decided by this court on the same day as Oestereich, involving the question of whether or not a Selective Service System registrant was entitled to deferment as a conscientious objector, this honorable court stated:

> ". . . In Oestereich the delinquency procedure by which the registrant was reclassified was without statutory basis and in conflict with petitioner's rights explicitly established by the statute and not dependent upon an act of judgment by the board. Oestereich, as a divinity student, was by statute unconditionally entitled to exemption. Here, by contrast, there is no doubt of the board's statutory authority to take action which appellee challenges, and that action inescapably involves a determination of fact and an exercise of judgment. By statute, classification as a conscientious objector is expressly conditioned on the registrant's claim being 'sustained by the local board.' 50 U.S.C. App. §456(g) . . ."

The question presented herein, as to whether or not pre-induction judicial review is precluded by Section 10(b)(3), Military Selective Service Act of 1967, 50 App. U.S.C. 460(b)(3) to a registrant entitled to a presidentially authorized statutory deferment under 50 App. U.S.C. 456(h)(1) and 50 App. U.S.C. 456(h)(2) is not specifically answered by either Oestereich or Gabriel.

But see *Kimball v. Selective Service*[4] where it is stated by the Court that " . . . the distinction attempted to be drawn by the Government between an 'exemption' under 456(g) and a 'deferment' under 456(h) is one without legal significance. Both sections are provided for by Acts of Congress, both promulgate precise rules for the Selective Service Boards to follow; and neither allows for judgment or discretion by such boards in carrying out the Congressional Mandate."

The underlying issue in the case at bar is whether the same reasoning and exception to Section 10(b)(3) which this Court found in Oestereich applies to a registrant with a presidentially authroized statutory deferment rather than a statutory exemption. Clearly if it is the mandate of Congress that a registrant who maintains a home with his wife and children be exempt from the Draft, that is the law. It is equally clear that if Congress authorizes the President to defer a father maintaining a home with his wife and children and the President does in fact provide for such a deferment, that is also the law.

Petitioner's case is on all fours with the facts in Oestereich. Both involve persons in institutions of higher learning who have

[4] 283 F. Supp. 606

part in organized demonstrations in opposition to the war in Vietnam. Both cases involve an act of returning draft cards to the government. Neither involve the destruction or mutilation of a draft card. Both registrants were declared delinquent by their local boards pursuant to instructions contained in the Memorandum and letter which issued from the Director of Selective Service in October, 1967. Neither was given an opportunity for a hearing on the finding of delinquency, nor was either given the opportunity to clear up the delinquency. Both were reclassified I-A on the same day that they "became delinquent". The reason for the alleged delinquency in each instance was the failure to possess a Draft card. Both were ordered to report forthwith for induction into the armed forces.

The teaching of *Oestereich* is clear: a student who is entitled by statute to an exemption from military service is entitled to judicial review of his reclassification, without having to make the harsh and risky choice of either defying induction and inviting criminal prosecution or submitting to induction and thereafter seeking judicial relief through habeas corpus. In *Oestereich*, this Court specifically relieved the registrant of that dilemma so as not to constitute Sec. 10(b)(3) "with unnecessary harshness." *Supra*, at 40554.

The argument that Ostereich involved an exemption for divinity students, whereas petitioner's case involves a III-A deferment for a registrant with a child or children and a registrant deferred by reason of extreme hardship to dependents, and that therefore the two cases are distinguishable, is insubstantial. The deferment which is granted to a registrant with a child or children and a registrant deferred by reason of extreme

hardship to dependents under the Military Service Act of 1967 is no less mandatory than the exemption for divinity students which is set out in the same statute.

To paraphrase the language of this Court in *Oestereich*, the statutory deferment is "plain and unequivocal . . . and since the scope of the statutory delinquency concept is not broad enough to sustain a revocation of what Congress has granted as a statutory right, or sufficiently buttressed by legislative standards, we conclude that pre-induction judicial review is not precluded in cases of this type." 37 U.S.L. Week at 4054-4055.

In light of the foregoing it is not surprising that the dissenting opinion by Mr. Justice Stewart in *Oestereich*, which Justices Brennan and White joined, concedes that, to the extent that Section 10(b)(3) is no bar to judicial review in a case involving a statutory "exemption", it is equally so in the case of a statutory "deferment" which "may just as 'plainly' preclude a registrant's induction." 37 U.S.L. Week of 4058, note 9.

B. Certiorari should be granted to determine whether Section 10(b)(3) precludes judicial review where it is claimed that a statute or administrative regulations are unconstitutional on their face and as applied.

In his concurring opinion in *Oestereich*, Mr. Justice Harlan emphasized the importance of the validity of preinduction judicial review where the governing statutes and regulations are attacked as facially unconstitutional. Petitioner's posture here is identical to that of *Oestereich* for it is his claim "that the very statutes or regulations which the

board administers are facially invalid", and therefore Section 10(b)(3) which has specific reference to "classification or processing" does not apply. 37 U.S.L. Week at 4055. The case at bar does not involve what Mr. Justice Harlan correctly characterized as "the numerous discretionary, factual, and mixed law-fact determinations which a Selective Service board must make prior to issuing an order to report for induction." *Ibid.*

Thus, the courts below were not asked to review factual or discretionary decisions inherent in the "classification or processing" of a registrant, which the statute is intended to prevent. Rather, they were asked to determine the constitutionality of an administrative procedure which was actually "beyond the competence of the Selective Service Boards to hear and determine". 37 U.S.L. Week at 4056. It is clear that the constitutionality of a federal statute is beyond the jurisdiction of administrative agencies. *Public Utilities Commission v. United States*, 355 U.S. 534, 539 (1958). This is especially true of local draft boards, given their composition.

A lower court has already applied these principles to a I-S registrant who was reclassified pursuant to another Hershey Memorandum which was incompatible with Sec. 6(h)(2). On the authority of *Oestereich* the court concluded that it was "beyond cavil that a statutory right cannot be taken away by Administrative fiat" and that the plaintiff's I-A request involved "only legal determinations by the board" which were therefore subject to judicial review. *Armendariz v. Hershey*, 37 U.S.L. Week 2462.

Any other reading of Sec. 10(b)(3), as Mr. Justice Harlan's concurring opinion in *Oestereich* makes clear, is incompatible with its constitutionality:

> "To withhold pre-induction review in this case would, thus, deprive petitioner of his liberty without the prior opportunity to present to any competent forum agency or court his substantial claim that he was ordered inducted pursuant to an unlawful procedure. Such an interpretation of §10(b)(3) would raise serious constitutional problems, and is not indicated by the statute's history, language, or purpose." 37 U.S.L. Week at 4056.

It is petitioner's contention that the action of respondents, for the reasons set forth in the following sections, were based upon regulations invalid on their face or as applied and that, therefore, Section 10(b)(3) cannot constitutionally be held to preclude pre-induction judicial review.

C. Certiorari should be granted to decide whether the punitive reclassification of petitioner violates the due process clause of the Fifth Amendment and the Sixth Amendment.

Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), spells out the criteria to be used to measure whether administrative sanctions are to be denominated penal or regulatory.

> "The punitive nature of the sanction here is evident under the tests traditionally applied to

> determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution. Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . ." 372 U.S. at 168-169.

Of the *Mendoza-Martinez* criteria, at least four clearly apply here.

(1) Induction "involves an affirmative disability or restraint." This could hardly be gainsaid, in light of the well-recognized facts of military life. Indeed, the availability of *habeas corpus* to secure release from the armed forces, *Eagle v. United States ex rel. Samuels*, 329 U.S. 304 (1946), necessarily rests upon such an hypothesis.

(2) Induction premised upon delinquency "comes into play only on a finding of *scienter*." The Act makes it an offense to "knowingly" fail or neglect to perform a required duty. Sec. 12(a)(b). This Court has imposed the same criminal *mens rea* requirements upon liability for delinquency status, reclassification, and induction consequent thereon. *Bartchy v. United States*, 319 U.S. 484 (1943).

(3) Punitive reclassification followed by induction is designed to "promote the traditional aims of

punishment-retribution and deterrence." The delinquency notice (SSS Form 304) resolves any doubt on this score, for it infoms the delinquent registrant that unless he brings himself into conformity with his duties under the Act and Regualtions, he will be subject to reclassification to Class I-A or to prosecution. One is at a loss to imagine any functions other than deterrence and retribution which might be served by taking a registrant out of a classification in which he otherwise belongs like IV-D (ministerial), IV-F (unfit for service), II-S (student), or III-A (dependency) — and reclassifying him for immediate induction into the armed forces.

(4) "[T]he behavior to which [punitive reclassification and induction] applies is already a crime," under Section 12(b) of the Act.

If the Court should hold that petitioner's induction is punishment, it would then be obligated to decide whether the punishment was imposed with due process of law. We believe the Court could not but conclude that due process is entirely absent from the procedures leading to petitioner's induction.

The procedures denied include the following: counsel [Reg. 1642.1(b)]; confrontation and cross-examination [see *Harris v. Ross*, 146 F.2d 355 (5th Cir. 1944)]; compulsory process [Reg. 1642.1(b)]; privilege against self-incrimination [Regs. 1622.1(c), 1622.10, 1623.2, 1625.1]; burden of proof [Regs. 1622.1(c), 1622.10]; an impartial tribunal; public trial [Regs. Part 1624]; jury trial.

As the Court observed in *Mendoza-Martinez*, "If the sanctions these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further." 372 U.S. at 167.[5]

D. Certiorari should be granted to decide whether the punitive use of delinquency and reclassification procedures, as in this case, is authorized by statute or regulation.

The Military Selective Service Act of 1967 declares that service in the armed forces is an obligation and privilege. Section 1(c), 50 App. U.S.C. Sec. 451(c). This view of service is also reflected in Section 6(j) of the Act which allows, if it does not encourage, exclusion from service of those convicted of offenses punishable by imprisonment for a term exceeding one year.

Nonetheless, respondents here have presumed to invoke the delinquency and reclassification procedures against petitioner because he violated Reg. 1617.1 which requires registrants to have their registration certificates in their personal possession, a requirement enforceable under the Act's penal provision, Section 12(b)(6), 50 App. U.S.C. Sec. 462(b)(6). Thus, the circumstances here are the same as in

[5] In its brief in *Oesterich*, the government conceded that

"If the essential purpose actually underlying delinquency reclassification is to punish registrants for their failure to comply with their duties under the Selective Service law and regulations, a serious constitutional question is raised, since none of the required constitutional safeguards traditionally associated with criminal punishment are provided." (p. 49)

Wolff v. Selective Service, 372 F.2d 817 (2nd Cir. 1967), where the Second Circuit held that the draft boards "exceeded their jurisdiction" when they undertook to declare registrants delinquent on the ground that they violated the Act's penal provisions. 372 F.2d at 820. "[N]o regulation authorizes a draft board to declare a registrant a delinquent or to reclassify him for such action." *Id.* at 821.

As *Wolff* points out, however, jurisdiction of some offenses under Section 12 is shared by the District Courts and the local boards. The decision refers explicitly to that portion of Section 12(a) which makes it a crime for any person knowingly to "fail or neglect or refuse to perform any duty required of him under or in execution of this title." Thus, as the Second Circuit said, "a parallel clause of the regulations provides that if a registrant fails to produce certain requested information or to appear for questioning, he may under 32 C.F.R. §1642.4(a) be declared a delinquent and classified or reclassified 1-A." 372 F.2d at 821.

The question here, therefore, is whether the possession requirement of Reg. 1617.1 is the kind of "duty" which, if not performed, can be the basis for delinquency and reclassification. We believe it is not.

The principal responsibility of local boards is to select young men for induction into the armed forces. "Classification is the key to selection." Reg. 1622.1(b), and the key to classification is "pertinent" information. Reg. 1622.1(b). The regulations empower the boards to secure this information in a wide variety of ways. See Regs. 1621.14, 1622.1(b), 1625.1(c), 1641.

being the key to classification, the local board must have some device by which to secure that information from uninformative registrants. That device is the delinquency procedure. Regs. Part 1642.

[illegible] properly viewed, is analogous to civil [illegible]. It is designed not to punish for past acts, but to [illegible] with the procedures of the system leading [illegible]. Delinquency status says to the registrant [illegible] counsels into compliance with the rules [illegible] your local board to ensure that you are [illegible] you will be treated as having waived all [illegible] the System's procedures and therefore as [illegible] immediate induction.

[illegible] regulations explicitly provide for the [illegible] delinquency. Indeed, they relax the ordinary [illegible] of classification cannot be had after an [illegible] induction thereby allowing the registrant [illegible] the requirements of Selective Service procedure [illegible] last moment. Reg. 1642.13(b). The registrant [illegible] the waiver of the Systems procedural rights [illegible] the armed forces. Up until the very last [illegible] cooperating with the procedures which [illegible] to make appropriate classification [illegible] consideration of his claim that he should [illegible] available for immediate induction. *Ibid.* The [illegible] itself requests the registrant to contact [illegible] expeditiously with an eye to clearing up [illegible].

[illegible] registrant of his Notice of Classification [illegible] with the ability of a local board to

perform its classification function. In no way is the board's consideration of the propriety of a registrant's current classification (or a classification he claims), or its ability to maintain official contact with him, impeded or affected by whether or not he happens to possess the required document.

It follows from the fact that the possession requirement is not an integral part of the relationship between a local board and its registrants, that to use reclassification as a sanction to enforce the requirement is to use it as punishment, not as mere "civil" enforcement of the rules of the classification procedure.

Acts unrelated to the classification process itself may be crimes under the Act. As such, they may well be punishable after a fair trial, before an impartial judicial tribunal, with all of the required procedureal safeguards and rights. They may not, under the Regulations, the Act, or the Constitution, be punished in summary proceedings appropriate only for "civil" enforcement of the rules of the classification process.

I. Certiorari should be granted to decide whether Reg. 1642.4, upon which petitioner's delinquency, reclassification, and induction order are based, is vague, and overbroad.

Reg. 1642.4(a) authorizes declarations of delinquency (and consequent 1-A classification and priority induction) of a registrant who "has failed to perform any duty or duties required of him under the selective service law . . . ." As construed by the government in this and other cases, the regulation can be and has been applied to punish a registrant for exercising First Amendment rights.

An examination of the regulations demonstrates that the delinquency provisions are designed to serve the discrete purpose of securing information needed for intelligent classification (see Sec. D, *supra*). Consequently, the "duties required" under Reg. 1642.4(a) are properly limited to such things, for example, as the duty to return the Classification Questionnaire within 10 days (Reg. 1621.10), the duty to correct an inadequate Questionnaire (Reg. 1621.13), and the duty to report for physical examination (Reg. 1628.16). But, as we have seen, the regulation has in fact been construed to include not only the alleged "duty" by petitioner to possess his Notice of Classification Card, but also the kind of "duty" said to have been owed by the appellants in *Wolff v. Selective Service*, *supra*. According to General Hershey, it could, and should, be construed also to include the "duty" not to violate the Act in its entirety, as well as its "related processes", and not to perform acts "under unfortunate influences of misdirected emotions . . . or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation . . ." App. O, *infra*, p. 43.

A statute or regulation which lends itself to such broad interpretation runs afoul not only of the general rule against vague statutes, see, e.g., *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); Amsterdam, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. Law Rev. 67 (1960), but also the rule in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), which condemns statutes with an "overbroad sweep . . . [which] lend themselves too readily to denial of [First Amendment] rights." 380 U.S. at 486.

In *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964), this Court said: "It is a familiar and basic

principle that a governmental purpose to control or prevent activities constitutionally subject to regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." And the Court repeated the admonition set out in *NAACP v. Button*, 371 U.S. 415 (1963): "[First Amendment] freedoms are delicate and vulnerable as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." 398 U.S. at 616.

The way in which Reg. 1642.4 had been applied brings it squarely within the doctrine which forbids overbroad legislation which invades rights protected by the First Amendment. The National Director of Selective Service has actively and publicly encouraged local boards to impose the sanctions on "misguided registrants" which his interpretation of the regulation has had the effect of discouraging protected activities. [Memorandum ... Petitioner made plain that "chilling" protected expression ... is at least Reg. 1642.4 should be struck down in its entirety because [it] will only a narrow portion of the prohibitions [it] will not contribute materially to [its] [illegible] standard. *Id.* at 491.

I. Certiorari should be granted to decide whether petitioner's surrender of his Notice of Classification was an act of speech protected by the First Amendment.

Petitioner alleged in his pleadings below, and has consistently maintained that the struggle in the Selective Service Notice of Classification card in order to express his Vietnam war was symbolic act of speech protected by the

public issue. As such, it was within the protection of the First Amendment guarantee of free speech. Since neither the destruction nor mutilation of the Certificate is involved, the facts of this case are distinguishable from those in *United States v. O'Brien*, 391 U.S. 367 (1968).

A consistent line of First Amendment cases has established the doctrine that symbolic action may often be protected speech under the First Amendment. Thus, "freedom of speech" has been held applicable to a whole gamut of cases, running from the display of a red flag in *Stromberg v. California*, 283 U.S. 359 (1931), to refusal to salute the American flag in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), to picketing by labor unions in *Thornhill v. Alabama*, 319 U.S. 88 (1940), to wearing black armbands in school to protest against the war in Vietnam in *Tinker, et al. v. Des Moines Independent Community School District*, 37 U.S.L.W. 4121.

Symbolic conduct such as the turning over of a draft card to a clergyman should be considered speech or expression within the protection of the First Amendment because it is peaceful in its content and directly relevant to the issue giving rise to the protest. Thus, in *Tinker*, the Court emphasized that petitioners were being punished for a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" on their part. 37 U.S.L. Week at 4122. Obviously not all speech and expression is protected under the Constitution, particularly where "nonspeech" elements are involved. See *United States v. O'Brien, supra*. The courts have confronted for more than a century the need for balancing the necessity for an ordered society against the equally vital constitutional requirement that the freedoms of speech and

assembly must be protected for that society to be democratic. This "delicate balance" has perennially required resort to such criteria as reasonableness, relevancy, and peacefulness, in weighing whether or not the action in question is constitutionally protected. But only the most "compelling" and "paramount" considerations have been held to justify infringement upon First Amendment freedoms where their exercise is *both* peaceful *and* relevant, as was surely the case with petitioner's action in turning over his draft card to a clergyman. See, for example, *NAACP* v. *Button*, *supra*; *Thomas* v. *Collins*, 323 U.S. 516 (1945); and *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

This Court has repeatedly recognized that conduct which is aimed at changing government policy by appealing to the government should be protected. It is only in this way that we insure that the government will be responsive to the will of the people. In *Stromberg* v. *California*, *supra* at 369, this Court held:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

Thus, this Court has repeatedly recognized the importance of First Amendment rights as they relate to the democratic process. Equal sensitivity has been demonstrated in numerous decisions to the fragility of these constitutional rights, particularly when their exercise involves issues of critical current national importance.

The Court has shown its concern not only with direct attempts to infringe upon such rights, but with all statutes, regulations, ordinances and the like which have an indirect but potentially limiting effect upon the exercise of First Amendment rights. Thus, statutory schemes which are found to impose restraints upon the freedoms of speech and assembly or which merely are found to have a "chilling effect" upon their exercise have been held to violate the Constitution. *Dombrowski v. Pfister*, 380 U.S. 479 (1965). It is in this tradition that the Court, ever since *Thomas v. Collins, supra*, has allowed "the widest room for discussion, the narrowest room for its restriction . . ." At 530.

The danger to the "transcendent value" of freedom of expression is clearly manifest in the present case. Some of the vital questions associated with the war in Vietnam have been and continue to be the effect of the war on our defense posture, our economy, our foreign relations, and our urban problems, to mention only a few. Symbolic protests such as peaceful marches, peaceful vigils, and the peaceful transmission of draft calls either directly to Washington or through the intermediary of a clergyman have been among the most widely used methods for ventilating such issues and raising these questions before the government and the public alike.

Conclusion.

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States District Court for the District of Maryland.

ORAL OPINION OF THE COURT
R. Dorsey Watkins, Judge.

This is Civil Action No. 19675, Michael J. Kraus versus Selective Service System Local 25, et al.

Petitioner has filed this civil action asking for a declaration as to the "constitutionality of an Act of Congress on its face and as applied to" petitioner, for an interlocutory and permanent injunction to restrain the enforcement thereof, and for the convening of a three judge court.

The defense has filed a motion to dismiss and opposition to the convening of a three judge court.

The issues, while important, seem to me to permit rather clear answers. The Court, accordingly, feels that a prompt disposition, rather than an extended opinion, is in order. The facts are not in dispute.

Petitioner registered with Local Board 25, and has received various classifications: I-D, student taking military training; I-A, when he withdrew from ROTC; II-S, student pursuing graduate work satisfactorily; I-A and on January 21, 1966 III-A on proof of marriage and dependents.

On October 16, 1967, petitioner participated in a demonstration at the induction center at Cincinnati, Ohio, and, with others, turned over his registration certificate to the

Army Colonel in charge of the induction center. Although the card should have been sent to Local Board 25, there is no record in the file of its receipt. In any event, no action was taken by the Board as a consequence either of the demonstration or of the surrender of the card.

Thereafter, in the course of an FBI investigation, petitioner prepared and circulated on December 8, 1967, a letter to plaintiff's relatives in which he candidly stated that "many of you I know very well will disagree with the illegal manner in which I have chosen to oppose the war."

On February 19, 1968, petitioner wrote to Local Board 25 enclosing his classification card and stating that the registration card may already have been received from Cincinnati.

On March 1, 1968, petitioner was declared to be a delinquent and reclassified 1-A, and sent a notice of delinquency for failure to perform required acts specifically failure to have in his possession his classification card. He was told that he had the right to a personal appearance or to appeal in 30 days, and that an appeal agent was available to aid and advise him.

On May 23, 1968, petitioner was sent notice to report for induction on June 19, 1968.

On May 30, petitioner acknowledged receipt, stating that his reclassification and subsequent induction are both illegal and that he should act accordingly. With reference to that there is attached an Addendum to Petitioner's Supplemental Citations of Authority, reading as follows:

Petitioner does, however, urge that the statute does not apply where First Amendment rights are involved. In support of this position, Petitioner relies primarily upon Wolff, 272 F. (2d) 817, in the Second Circuit, and Oesterich, now on certiorari in the Supreme Court. Neither of these supports the Petitioner's position with respect to the validity of the restrictive statute, as I think the holding generally is that as long as an adequate remedy is provided at some stage Congress has substantially complete latitude to determine at what stage it shall be made available, and here through habeas corpus or through defense to a criminal proceeding complete safeguards, again with the possible question of res judicata, are provided petitioner, and Congress may very well have felt that rather than disrupting the induction procedure per se by any number of applicants seeking the type of relief sought here, that the thing to do was to have it done in one of the decisive ways, habeas corpus or defense to a criminal proceeding.

I say neither Wolff nor Oesterich seems to me to support the contention that if First Amendment right is alleged to be involved, that that cross cuts supersedes, suspends and displaces the law of the draft.

Wolff, if properly decided, and there, with the greatest respect to the Second Circuit, I think there is some question as to whether it was, and see, for example, the notation in 81 Harvard Law Review 685, 688, and 36 Georgetown Law Review 414, at 419, as it seems to me readily distinguishable, the Court there held that conduct, a demonstration, while possibly punishable criminally, did not constitute any violation of any specific provision of the Selective Service Act. There is no such defined in the Act or any regulations

any statement that "you shall not demonstrate" through you do find specific requirements in the regulations "you shall have in your possession the registration card [and] you shall have in your possession the classification card."

The distinction between undirected criminal conduct and the failure to perform a duty specifically required by regulations was recognized by the Second Circuit itself in *Stallman v. Selective Service Board*, 1 Selective Service Law Reporter 3085, where the reclassification of a student [illegible] and therefore being without the classification card was held justification for reclassification to 1-A, and it is interesting to note that the Solicitor General rejected the granting of certiorari on the ground that a 1-A classification is not a statutory "exemption" and referring to the incorporation by reference of which reference will be made in another connection hereinafter [illegible] [illegible] this case.

Upon being fully advised [illegible] [illegible] delinquent for failure to have [illegible] delinquent and 1-A. The Solicitor General rejected [illegible] approach that ordinarily [illegible] [illegible] of the only available remedies [illegible] [illegible] authority to review or to grant [illegible] [illegible] distinguished from a declaration [illegible] recommended that the case be remanded to the District [illegible] to determine whether [illegible] [illegible] fact in controversy.

It is clear that in the [illegible] [illegible] [illegible]

provisions, and among them, by similar executive order, is the requirement that the registrant shall be in possession of the registration and classification cards, so that since the President by executive order did not have to create a III A classification it seems to me perfectly clear that he would have the right to define those who could come within it and those who could say [sic] within it, and I think he had the undoubted right to impose, as a condition of any deferment that effect provisions be met, and among those provisions being the possession of registration and classification cards.

I therefore think that Section 460(b)(3) is applicable and that it is a bar to the prosecution of the suit. That of course makes it unnecessary to consider the application for a Three Judge Court but since I have learned that at least in the opinion of several of the Circuit Judges this Court is not infallible it may perhaps be as well to deal with this second aspect of the case anyway.

Secondly, I think it the fact that no case is cited by the Petitioner in which it is held that a Three Judge Court was required or could be called in a matter involving the subject matter here. Wolff was not a Three Judge Court. Oesterreich is interesting in that initially in the District Court the Government said that the Petitioner should have asked for a Three Judge Court however the Solicitor General in his memorandum to the Supreme Court, makes no mention of that and recommends that the case be remanded to the District Court for determination by it whether the jurisdictional amount was involved so that you have the clear implication that this is not the type of case which is within the coverage of the Three Judge Court Statutory provisions not can that be changed by the contention that a substantial federal question is involved here.

The argument is that the provision requiring the maintenance of the possession of registration and classification cards is an interference with freedom of speech and that treating the turning in of cards, or the not having of cards as a violation is a violation of symbolic speech. Well, in the particular case the turning in of the card imposed no restriction upon the Petitioner's speaking, writing, doing anything which otherwise he might have done with respect to his views on the Vietnam war or any other matter on which he had views. Certainly the method of communication adopted was almost the least likely to convey a meaningful message.

The ears of the Secretary of the Selective Service Board are probably as nearly immune to effect from speeches of this sort as any ears which could be found, and the members of the Board, if they read it, would probably fall within the same category. So probably it was the least possibly effective method of speech to be symbolic to be selected, but I think the important thing is that the physical act, whatever effect that has on his status as a draftee, had no effect upon his ability to communicate through speech or through appropriate symbolic conduct his ideas with respect to the war or anything else.

If you can violate the provisions of regulations as a means of symbolic speech, [illegible] and in the University of Pennsylvania Law Review 1968 and 1969, that the whole function of the volunteer [illegible] for the purpose of protesting.

I suggested on the argument of the case [illegible] does not like the motor vehicle law [illegible] and says his method of protest which I think is almost exactly [illegible]

without and says that any prosecution arising out of that would be an infringement of the right to free speech it seems to me that such analogies are always dangerous. The one which further occurred to me is when traffic regulations were initially imposed St. Paul Street was one way northbound, and the way to remember it was – it was up at is Saint and it ends in 'power' it ain't – and Charles Street was one way southbound and shortly thereafter that was reversed and Charles Street became one way northbound and St. Paul one way southbound and the merchants on Charles Street protested heavily and offered what seemed to be very satisfactory evidence that their business was seriously impaired by their, the old latter and perhaps the elderly gentlemen would not walk up hill from St. Paul to Charles Street and abandon the custom their business among others has fallen off.

Well, one could see [illegible] those merchants send in [illegible] and say at 8:30 on the morning I am going to [illegible] north on St. Paul Street because [illegible] and I am going to buy me a northbound and it anybody else [illegible] I will sue [illegible] through the symbolic speech [illegible] protecting the regulations which [illegible] Baltimore City.

[illegible] I think it would [illegible] and ordinary [illegible] those [illegible] to me to [illegible] that [illegible] and [illegible] Amendment right [illegible] the [illegible]

[illegible]

Petitioner also argues that the requirement in the regulations that registrants keep their registration certificates in their possession at all times (32 C.F.R. 1617.1) violates the First Amendment, at least as applied to registrants whose surrender of their certificates is intended as a form of political protest or "symbolic speech." However, the possession requirement has been upheld against First Amendment challenge by every Court of Appeals which expressly or implicitly has considered the question. Citing three Court of Appeals decisions.

I think the Supreme Court decision in O'Brien must dispose of at least the contention that conduct of this sort can be classed as "symbolic speech." Now I fully recognize that O'Brien was a case in which there was a criminal prosecution for the destruction of the registration cards, but it seems to me to be impossible to say destroy your draft card and you can't but it with this.

In 3 Criminal Law Reporter 3099 at 3101 in O'Brien the Supreme Court said: We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face nor as the petitioner understood O'Brien to argue, otherwise. Amendment 1 [illegible] deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System and there is nothing inherently expressive about such conduct.

Well, it is clear that [illegible] destruction which is [illegible] prohibits the sending through the mail and [illegible] [illegible] [illegible]

"The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses." I thought I had thought of that myself "or a tax law prohibiting the destruction of books and records."

"We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

And legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the Selective Service administration."

Then the Court goes on [illegible] to a long explanation of how having two certificates is an easy and painless way to thwart questions and relieve the Service of [illegible] which otherwise it would have - not that they are in the nation or [illegible] except as he has done what he is required to do, that is [illegible] system in the functioning of the Board, the destruction and mutilation increases the difficulty of detecting and tracing the [illegible] functions performed by Selective Service Certificates [illegible] beyond doubt that Congress has a legitimate and

substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability.

We think it is apparent that the continuing availability to each registrant of his Selective Service certificate substantially furthers the smooth and proper functioning of the System that Congress has established to raise armies. We think it is also apparent that the nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of ready and quickly responding to continually changing circumstances. For these reasons the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

The matter is also discussed in very substantial detail in the Shuttman case—one Selective Service Law Reporter case where the Court with respect to this says:

"We fail to see how Petitioner's right of retrieval is continuing that he says it is and it is agreed that we must regard this as a positive Congressional mandate not to consider Petitioner's [card] as [anything] that is surrendered for use to protect his speech. The Court refers to and quotes from O'Brien and distinguishes Rumsfeld and Oestereich, that in those cases it was removed from the statutorily required [Selective Service] exemptions [from the Board is taking away a limited entitlement by] new regulations.

Secondly, the case is unacceptable for a Three Judge Court because a Three Judge Court in Seattle is not convened only when the constitutionality of an act of Congress is drawn in question and in this case it is the

applicability of executive orders as distinguished from acts of Congress which are called to task.

The distinction is recognized in Oestereich. The distinction is recognized in Shiffman, though not in connection with a Three Judge Court approach.

In the supplemental memorandum some reference was made as to the validity of the Selective Service in the absence of war. It is not in the pleadings. I do not think it is properly before the Court. If it were, I would say simply that that is a political question as distinguished from a judicial one, and, further, that if you take the language in O'Brien, it seems to me that Congress has the right in times of "peace" to prepare for war. I interpolate, I have my own feelings about whether we are at war or not, and I am concerned about what the effect on prisoners captured may be in the absence of a declaration of war, but that is only one of my thousands of concerns, and has no legitmate place in this opinion.

If contrary to what I have held, this was a case in which the Court had jurisdiction, I would decline to issue an injunction on the grounds that I think that the delay is inexcusable. In this case, the Petitioner knew since March of what his ultimate fate was going to be. He secured an extension of time, and then within the extension, as I understand it, really consulted counsel who did then take the Herculean task of trying to get ready. I have no criticism whatever of counsel in either the volume of work or the kind of work that they did, and particularly in the time they had, but it seems to me that the Petitioner deliberately held things up on the theory that he could at least get a few days more by coming into Court and saying look, they are going to draft

me on the 8th and give me a chance to have a hearing. He has gotten a postponement of some days, at least.

I further feel that it is quite clear that Petitioner has failed to exhaust his administrative remedies. He has, very frankly, and perhaps commendably, stated that he did not intend his letter of May 30, 1968 to be either an application for a reclassification or an appeal.

Now, I do not purport to forecast what the outcome of an application for reclassification or an appeal would have been. I can say only that here there was a deliberate intent to bypass the ordinary administrative remedies and to try to force this Court to come in a case where, in the Court's opinion, it should not be and cannot be.

I will grant the motion to dismiss.

APPENDIX B.

Opinion of United States Court of Appeals For The Fourth Circuit.

JOHN D. BUTZNER, Jr., CIRCUIT JUDGE:

This appeal concerns the effect of §10(b)(3) of the Military Service Act of 1967 on Michael J. Kraus' action to enjoin his impending induction into the armed forces. The Act [50 U.S.C. App. §460(b)(3)(1968)] provides in part:[1]

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the president, except as a defense to a criminal prosecution instituted under section 12 of this title . . . ."

The district court held that the statute prohibited preinduction judicial review of Kraus' classification and the order for him to report for induction, and it dismissed his complaint for declaratory and injunctive relief. We affirm, but in doing so we hold only that Kraus' complaint was premature. We do not pass upon the merits of his claim.

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[1] The 1967 amendment, §9(c) of the Military Service Act of 1967, 81 Stat. 104, codified prior case law. E.G., *Witmer v. United States*, 348 U.S. 375 (1955); *Estep v. United States*, 327 U.S. 114 (1946); and *Falbo v. United States*, 320 U.S. 549 (1944). But see *Wolff v. Local Bd. No. 16*, 372 F.2d 817 (2d Cir. 1967), which allowed pre-induction review of delinquency reclassification. "Section 10(b)(3) was likely precipitated by [Wolff]." *Oestereich v. Selective Service Bd. No. 11*, 37 U.S.L.W. 4053, 4056 n.7 (Dec. 16 1968) (concurring opinion of Mr. Justice Harlan). The 1967 amendment was designed to reemphasize that "judicial review of classification should not occur until after the registrant's administrative remedies have been exhausted and the registrant presents himself for induction." S. Rep. No. 209, 90th Cong., 1st Sess., 10 (1967), quoted in *Oestereich v. Selective Service Bd. No. 11*, No. 11, 37 U.S.L.W. 4053, 4057 (Dec. 16, 1968) (dissenting opinion of Mr. Justice Stewart).

These may be asserted after induction by habeas corpus, or if he refuses induction, by his defense to criminal prosecution.

Kraus is thirty-one years of age. He had a III-A dependency deferment as a father living with his wife and children. To protest United States action in Vietnam he returned his registration certificate and classification card to the government. His local board declared him a delinquent on the ground that he failed to have his classification card in his possession and reclassified him I-A. When ordered to report for induction, he responded by bringing this action, alleging that his reclassification was punitive, and that it violated the First and Fifth Amendments of the Constitution. He also attacked the constitutionality of § 10(b)(3) and the statutes and regulations under which the board acted.

The Supreme Court construed § 10(b)(3) in *Oestereich v. Selective Service Bd. No. 11*, 37 U.S.L.W. 4053 (Dec. 16, 1968), and *Clark v. Gabriel*, 37 U.S.L.W. 3217 (Dec. 16, 1968).[2] These cases do not deal expressly with Kraus's situation, but they chart the course we believe must be followed. Gabriel sought to enjoin his induction and to obtain a declaration that the rejection of his claim to conscientious objector classification was improper. The Court observed that the board had statutory authority to take the action which Gabriel challenged, and that the classification involved a

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[2]The Supreme Court also denied applications for stays in *Shiffman v. Selective Service Bd. No. 5*, 391 U.S. 930 (1968), and *Zigmond v. Selective Service Bd. No. 16*, 391 U.S. 930 (1968). In both cases the registrants were declared delinquents and lower courts applied § 10(b)(3) to deny preinduction review. See also *Boyd v. Clark*, 287 F.Supp. 561 (S.D. N.Y. 1968), *aff'd per curiam*, 37 U.S.L.W. 3246 (Jan. 13, 1969), which held that § 10(b)(3) barred a pre-induction challenge to the constitutionality of student deferments.

determination of fact and exercise of the board's judgment. The Court held §10(b)(3) to be constitutional and that it barred Gabriel's premature application for relief, saying:

> "We find no constitutional objection to Congress' thus requiring that assertion of a conscientious objector's claims such as those advanced by appellee, be deferred until after induction, if that is the course he chooses, whereupon habeas corpus would be an available remedy, or until defense of the criminal prosecution which would follow should he press his objections to his classification to the point of refusing to submit to induction." 37 U.S.L.W. at 3217.

Oestereich, as a gesture of protest, returned his registration certificate to the government. The board declared him delinquent for failure to have the certificate in his possession, classified him I-A, and ordered his induction. The significant factual difference that distinguishes *Oestereich* from the case before us is this: Oesterich was a ministerial student with a IV-D exemption. Kraus, as previously mentioned, had a III-A dependency deferment. In *Oestereich* the Court held that §6(g) of the Act [50 U.S.C. App. §456(g)(1968)], which provides in part that "students preparing for the ministry . . . shall be exempt from training and service . . .," created a statutory exemption beyond reach of the board through delinquency proceedings. The Court said at 37 U.S.L.W. 4054:

> "Once a person registers and qualifies for a statutory exemption, we find no legislative authority to deprive him of that exemption because of conduct or activities unrelated to the merits of granting or continuing that exemption. The Solicitor General

confesses error on the use by Selective Service of delinquency proceedings for that purpose.[3]

Kraus stands on a somewhat different footing than Oesterreich. Previously Kraus had been granted a student deferment. Section 6(h)(1) of the Act[4] provides that upon the termination of a student deferment, the registrant shall be liable for induction regardless of his age unless he is deferred under other exceptions specified in the Act. Among the exceptions is deferment for extreme hardship to dependents.

[3] In his memorandum submitted to the Court in April 1968 the Solicitor General stated in part:

> It is possible to construe § 6(h)(1) as applicable to the generality of situations where the local board has applied its judgment but to exclude purported action of a board which is in fact contrary to an exemption which has been expressly granted by statute. Such a construction is not only possible here but it is desirable in order to avoid conflict with the congressional determination to grant exemption to ministers and ministerial students. In this situation it may be observed that there is room for an appropriate distinction between an order which is contrary to the terms of a statute and an order which is subject to challenge only on the ground that the board has misapplied or abused its authority in making its judgment.

[4] Title 50 U.S.C. App. § 456(h)(1) (1968) states in part:

> Any person . . . who requests and is granted a student deferment . . . shall upon the termination of such a deferred status . . . be liable for induction as a registrant within the prime age group irrespective of his actual age unless he is otherwise deferred[.] As used in this subsection the term 'prime age group' means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

Section 6(h)(2) of the Act[5] authorizes the President "under such rules and regulations as he may prescribe" to grant a deferment to a person who lives with his wife and children. It was under these provisions that Kraus was granted his III-A dependency deferment.

Among the rules and regulations to which Kraus' deferment was subject were those which required him to retain in his personal possession at all times his registration certificate[6] and notice of classification.[7] In a memorandum dated October 24, 1967, the Director of Selective Service recommended that local boards should declare a registrant delinquent if he fails to keep these papers in his possession[8] and to reclassify him 1-A.[9]

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[5] Title [illegible] App. 456 (h)(2) provides in part:

"[T]he President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and services in the armed forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes."

[6] Title [illegible] 1617.1 provides in part:

"Every person . . . must, after he has registered, have in his personal possession at all times his Registration Certificate . . ."

[7] Title [illegible] 1623.1 provides in part:

"Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate, a valid Notice of Classification . . ."

[8] Title [illegible] 1642.4(a) provides:

"Whenever a registrant has failed to perform any duty or duties required of him under the selective service law . . . the local board may declare him to be a delinquent."

[9] Title [illegible] 1642.12 provides in part:

"[A]ny delinquent registrant between the ages of 26 and 35 who on June 19, 1951, was, or thereafter has been or may be, deferred under any other provision of section 6 of such Act . . . may be classified in or reclassified into Class . . ."

It is apparent from the Act that Kraus did not have a statutory exemption that was placed beyond the scope of delinquency proceedings. Instead, he had an administrative deferment which was subjected by statute to rules and regulations prescribed by the President. The validity of Kraus' reclassification and order to report for induction depend upon the propriety of the administrative action taken by the board. But thus far the board has taken only intermediate steps. Not until Kraus is accepted or rejected for service will the administrative process be completed. Kraus' situation provides no compelling reason for departing from the long established principle that "Congress [is] not required to provide for judicial intervention before final acceptance of an individual for national service." *Falbo v. United States*, 320 U.S. 549, 544 (1944). For similar reasons, albeit under different circumstances, the constitutionality of §10(b)(3) was upheld in *Clark v. Gabriel*, 37 U.S.L.W. 2317 (Dec. 16, 1968).

The only exception to the defendent of judicial review recognized by the Supreme Court arises from administrative action that deprives a registrant of a statutory exemption. E.g., *Oestereich v. Selective Service Bd. No. 11*, 37 U.S.L.W. 4053 (Dec. 16, 1968). Since Kraus does not fall within this exemption, he can contest his reclassification only after completion of administrative action as prescribed by Congress in §10(b)(3). In reaching this conclusion we find support in other recent decisions that have denied pre-induction review to delinquent registrants who had classifications similar, but not identical, to Kraus' III-A dependency deferment: *Kolden v. Selective Service Bd. No. 4*, No. 19,331 (8th Cir., Jan. 28, 1969) (graduate student); *Breen v. Selective Service Bd. No. 16*, No. 32, 345 (2nd Cir., Jan. 10, 1969) (undergraduate);

Zigmond v. Selective Service Bd. No. 16, 396 F.2nd 290 (1st Cir. 1968) (former student not in the prime age group); *Carpenter v. Hendrix*, 277 F.Supp. 660 (N.D. Ga. 1967) (junior college student). *Contra*, *Armendariz v. Hershey*, 37 U.S.L.W. 2461 (W.D. Texas, Feb. 5, 1969) (graduate student); *Kimball v. Selective Service Bd. No. 15*, 283 F.Supp. 606 (S.D. N.Y., 1969) (undergraduate).

Kraus' claims are substantial. In holding that he connot assert them at this time, we do not adjudicate the merits of his complaint. Nor do we decide the government's alternative defense—Kraus' failure to exhaust his administrative appeals. Kraus' post-induction review will provide an appropriate forum for the consideration of this issue in the light of Kraus' constitutional and statutory challenge of his classification.

The judgment of the district court is affirmed.

APPENDIX C.

Military Selective Service Act of 1967, Sec. 10(b)(3)
[50 App. U.S.C. Sec. 460(b)(3)]

No judicial review shall be made of the classficiation or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

APPENDIX D.

Military Selective Service Act of 1967, Sec. 6(h)(1) [50 App. U.S.C. Sec. 456(h)(1)]

"Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under subsection (i) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship of deferments), or for graduate study, occupation, or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (i) of this section after attaining the nineteenth anniversary of the date

of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within the prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term 'prime age group' means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers."

APPENDIX E.

Military Selective Serivce Act of 1967, Sec. 6(h)(2)
[50 App. U.S.C. Sec. 456(h)(2)]

(2) Except as otherwise provided in this subsection the President is authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons whose employment in industry, agriculture, or other occupations or employment, or whose continued service in an Office (other than an Office described in subsection (f)) under the United States or any State, territory, or possession, or the District of Columbia, or whose activity in graduate study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest: *Provided*, That no person within any such category shall be deferred except upon the basis of his individual status: *Provided further*, That persons who are or may be deferred under the provisions of this section shall remain liable for training and service in the Armed Forces under the provisions of section 4(a) of this Act [section 454(a) of this Appendix] until the thirty-fifth anniversary of the date of their birth. This proviso shall not be construed to prevent the continued deferment of such persons if otherwise deferable under any other provisions of this Act. The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces (1) of any or all categories of persons in a status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable, and (2) of any or all categories of those persons found to be physically, mentally, or morally deficient or defective. For the purpose

of determining whether or not the deferment of any person is advisable, because of his status with respect to persons dependent upon him for support, any payments of allowances which are payable by the United States to the dependents of persons serving in the Armed Forces of the United States shall be taken into consideration, but the fact that such payments of allowances are payable shall not be deemed conclusively to remove the grounds for deferment when the dependency is based upon financial considerations and shall not be deemed to remove the ground for deferment when the dependency is based upon other than financial considerations and cannot be eliminated by financial assistance to the dependents. Except as otherwise provided in this subsection, the President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment from training and service in the Armed Forces of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes. No deferment from such training and service in the Armed Forces shall be made in the case of any individual except upon the basis of the status of such individual. There shall be posted in a conspicuous place at the office of each local board a list setting forth the names and classifications of those persons who have been classified by such local board. The President may, in carrying out the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], recommend criteria for the classification of persons subject to induction under this title [said sections], and to the extent that such action is determined by the President to be consistent with the national interest, recommend that such criteria be administered uniformly throughout the United States whenever practicable, except that no local board, appeal board, or other agency of appeal

of the Selective Service System shall be required to postpone or defer any person by reason of his activity in study, research, or medical, dental, veterinary, optometric, osteopathic, scientific, pharmaceutical, chiropractic, chiropodial, or other endeavors found to be necessary to the maintenance of the national health, safety, or interest solely on the basis of any test, examination, selection system, class standing, or any other means conducted, sponsored, administered, or prepared by any agency or department of the Federal Government, or any private institution, corporation, association, partnership, or individual employed by an agency or department of the Federal Government.

APPENDIX F.

§ 1622.30 Class III-A: Registrant with a Child or Children, and Registrant Deferred by Reason of Extreme Hardship to Dependents.

(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued by the delivery of registrants in such category, except that a registrant who is classified in Class II-S after the date of enactment of the Military Selective Service Act of 1967 shall not be eligible for classification in Class III-A under the provisions of this paragraph.

(b) In Class III-A shall be placed any registrant whose induction into the armed forces would result in extreme hardship (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, or (2) to a person under 18 years of age or a person of any age who is physically or mentally handicapped whose support the registrant has assumed in good faith: *Provided*, That a person shall be considered to be a dependent of a registrant under this paragraph only when such person is either a citizen of the United States, its Territories, or possessions.

(c) (1) The term "child" as used in this section shall include a legitimate or an illegitimate child from the date of its conception, a child legally adopted, a stepchild, a foster child; and a person who is supported in good faith by the registrant in a relationship similar to that of parent and child but shall not include any person 18 years of age or over unless he is physically or mentally handicapped.

(2) As used in this section, the term "physician" means a registrant who has received from a school, college, university, or similar institution of learning the degree of doctor of medicine or the degree of bachelor of medicine, the term "dentist" means a registrant who has likewise received the degree of doctor of dental surgery or the degrees of doctor of dental medicine, and the term "veterinarian" means a registrant who has likewise received the degree of doctor of veterinary surgery or the degree of doctor of veterinary medicine.

(3) No registrant shall be placed in Class III-A under paragraph (a) of this section because he has a child which is not yet born unless prior to the time the local board mails him an order to report for induction which is not subsequently cancelled there is filed with the local board the certificate of a licensed physician stating that the child has been conceived, the probable date of its delivery, and the evidence upon which his positive diagnosis of pregnancy is based.

(d) In the consideration of a dependency claim, any payments of allowances which are payable by the United States to the dependents of persons serving in the Armed

Forces of the United States shall be taken into consideration, but the fact that such payments of allowances are payable shall not be deemed conclusively to remove the grounds for deferment when the dependency is based upon financial considerations and shall not be deemed to remove the grounds for deferment when the dependency is based upon other than financial considerations and cannot be eliminated by financial assistance to the dependents.

APPENDIX G.

Persons Required To Have Notice of Classification (SSS Form 110) in Personal Possession.

Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form 2), a valid Notice of Classification (SSS Form 110) issued to him showing his current classification. When any such person is inducted into the armed forces or enters upon active duty in the armed forces, other than active duty for training only or active duty for the sole purpose of undergoing a physical examination, he shall surrender his Notice of Classification (SSS Form 110) to the commanding officer of the joint examining and induction station or to the responsible officer at the place to which he reports for active duty, who shall destroy such notice.

APPENDIX H.

§1631.7 Action by Local Board Upon Receipt of Notice of Call.

(a) When a call is placed without designation of age group or groups, each local board, upon receiving a Notice of Call on Local Board (SSS Form 201) from the State Director of Selective Service (1) for a specified number of men to be delivered for induction, or (2) for a specified number of men in a medical, dental, or allied specialist category to be delivered for induction, shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class I-A and Class I-A-O and have been found acceptable for service in the Armed Forces and to whom the local board has mailed a Statement of Acceptability (DD Form 62) at least 21 days before the date fixed for induction: *Provided*, That a registrant classified in Class I-A or Class I-A-O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability (DD Form 62): *And provided further*, That a registrant classified in Class I-A or Class I-A-O who has volunteered for induction may be selected and ordered to report for induction notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and regardless of whether or not a Statement of Acceptability (DD Form 62) has been mailed to him. Such registrants, including those in a medical, dental, or allied specialist category, shall be selected and ordered to report for induction in the following order:

(1) Delinquents who have attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

(2) Volunteers who have not attained the age of 26 years in the sequence in which they have volunteered for induction.

(3) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who (A) do not have a wife with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first, or (B) have a wife whom they married after the effective date (August 26, 2965) of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(4) Nonvolunteers who have attained the age of 19 years and have not attained the age of 26 years and who have a wife whom they married on or before the effective date (August 26, 1965) of this amended subparagraph and with whom they maintain a bona fide family relationship in their homes, in the order of their dates of birth with the oldest being selected first.

(5) Nonvolunteers who have attained the age of 26 years in the order of their date of birth with the youngest being selected first.

(6) Nonvolunteers who have attained the age of 18 years and 6 months and who have not attained the age of 19 years in the order of their dates of birth with the oldest being selected first.

In selecting registrants in the order of their dates of birth, if two or more registrants have the same date of birth they shall, as among themselves, be selected in alphabetical order.

APPENDIX I.

32 C.F.R. Sec. 1642.4:

Declaration of delinquency status and removal therefrom.

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).

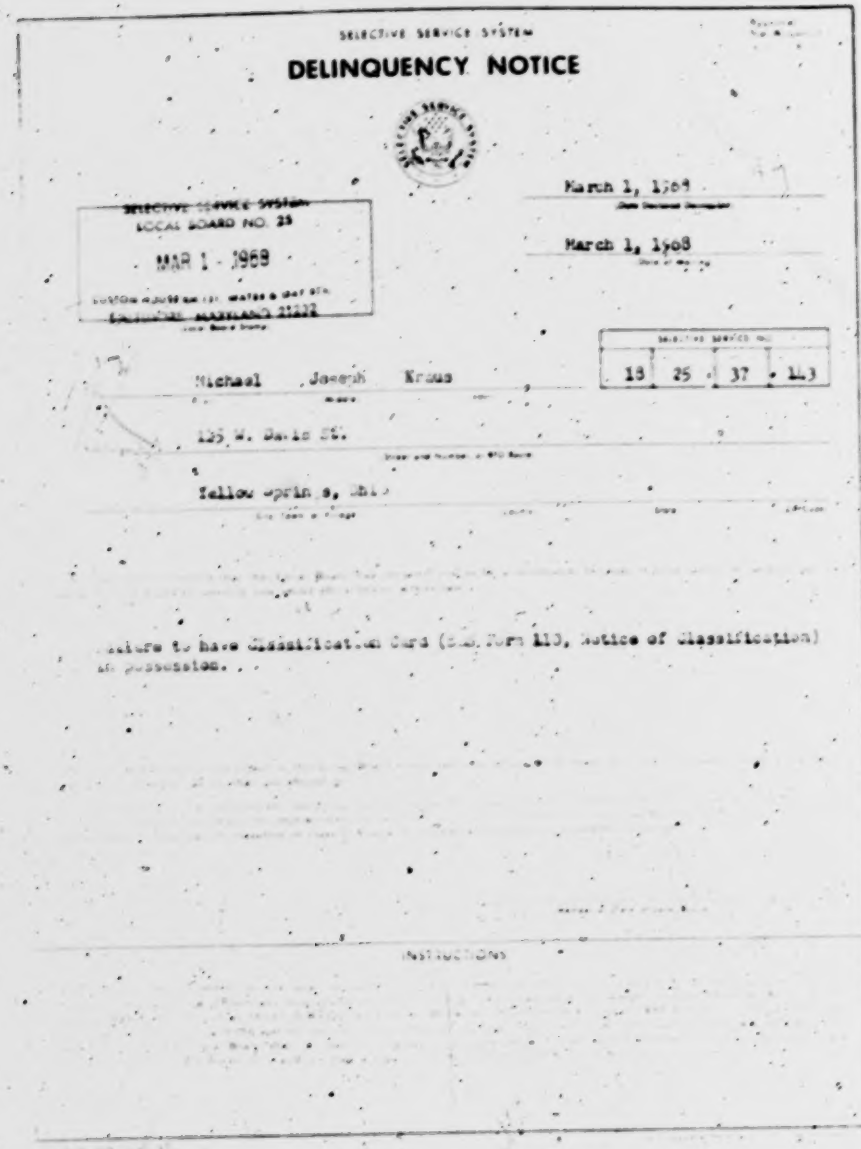
APPENDIX J.

32 C.F.R. Sec. 1642.12
Classification of Delinquent Registrant.

Any delinquent registrant between the ages of 18 years and 6 months and 26 years and any delinquent registrant between the ages of 26 and 28 who was deferred under the provisions of section 6(c)(2)(A) of the Military Selective Service Act of 1967 which were in effect prior to September 3, 1963, and any delinquent registrant between the ages of 26 and 35 who on June 19, 1951, was, or thereafter has been or may be, deferred under any other provision of section 6 of such Act, including the provisions of subsection (c)(2)(A) in effect on and after September 3, 1963, may be classified in or reclassified into Class I-A, Class I-A-O or Class I-O, whichever is applicable, regardless of other circumstances: *Provided*, That a delinquent registrant who by reason of his service in the Armed Forces is eligible for classification into Class IV-A may not be classified or reclassified into Class I-A, Class I-A-O or Class I-O under this section unless such action is specifically authorized by the Director of Selective Service.

APPENDIX K.

Delinquency Notice.



SELECTIVE SERVICE SYSTEM

DELINQUENCY NOTICE

SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 25
MAR 1 - 1968
[illegible]
EMMITSBURG, MARYLAND 21727

March 1, 1968

March 1, 1968

SELECTIVE SERVICE NO.
19 25 37 143

Michael Joseph Kraus

125 W. Main St.

Yellow Springs, Ohio

Failure to have Classification Card (S.S. Form 110, Notice of Classification) in possession.

(Notations)

APPENDIX L.

Order to Report for Induction.

SELECTIVE SERVICE SYSTEM

ORDER TO REPORT FOR INDUCTION

Approval Not Required

SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 28
MAY 23 1968
CUSTOM HOUSE [illegible]
BALTIMORE, MARYLAND 21202

The President of the United States,

To

Mr. Michael J. Kramo
115 W. Davis Street
Yellow Springs, Ohio

May 23, 1968
(Date of mailing)

SELECTIVE SERVICE NO.			
18	25	37	143

GREETING:

You are hereby ordered for induction into the Armed Forces of the United States, and to report

at Basement, Custom House, Gay & Lombard Sts., Baltimore, Md.
(Place of reporting)

on JUN 19 1968 at 7:45 A.M.
(Date) (Hour)

for forwarding to an Armed Forces Induction Station.

BRING THIS ORDER WITH YOU WHEN YOU REPORT

(Member or clerk of Local Board)

IMPORTANT NOTICE
(Read Each Paragraph Carefully)

DO NOT BRING YOUR CAR

IF YOU HAVE HAD PREVIOUS MILITARY SERVICE, OR ARE NOW A MEMBER OF THE NATIONAL GUARD OR A RESERVE COMPONENT OF THE ARMED FORCES, BRING EVIDENCE WITH YOU. IF YOU WEAR GLASSES, BRING THEM. IF MARRIED, BRING PROOF OF YOUR MARRIAGE. IF YOU HAVE ANY PHYSICAL OR MENTAL CONDITION WHICH, IN YOUR OPINION, MAY DISQUALIFY YOU FOR SERVICE IN THE ARMED FORCES, BRING A PHYSICIAN'S CERTIFICATE DESCRIBING THAT CONDITION, IF NOT ALREADY FURNISHED TO YOUR LOCAL BOARD.

Valid documents are required to substantiate dependency claims in order to receive basic allowance for quarters. [illegible] the following with you when reporting to the induction station. The documents will be returned to you. (1) FOR LAWFUL WIFE OR LEGITIMATE CHILD UNDER 21 YEARS OF AGE, original, certified copy or photostat of a certified copy of marriage certificate, child's birth certificate, or a public or church record of marriage issued over the signature and seal of the custodian of the church or public records; (2) FOR LEGALLY ADOPTED CHILD, certified court order of adoption; (3) FOR CHILD OF DIVORCED SERVICE MEMBER (child in custody of person other than claimant): (1) Certified or photostatic copies of receipts from custodian of child evidencing serviceman's contributions for support, and (2) Divorce decree, court support order or separation order; (4) FOR DEPENDENT PARENT, affidavits establishing that dependency.

Bring your Social Security Account Number Card. If you do not have one, apply at nearest Social Security Administration Office. If you have life insurance, bring a record of the insurance company's address and your policy number. Bring enough clean clothes for 3 days. Bring enough money to last 1 month for personal purchases.

This Local Board will furnish transportation, and meals and lodging when necessary, from the place of reporting to the induction station where you will be examined. If found qualified, you will be inducted into the Armed Forces. If found not qualified, return transportation and meals and lodging when necessary, will be furnished to the place of reporting.

You may be found not qualified for induction. Keep this in mind in arranging your affairs, to prevent any undue hardship if you are not inducted. If employed, inform your employer of this possibility. Your employer can then be prepared to continue your employment if you are not inducted. [illegible] you must report for work as soon as possible after the completion of your induction examination. You may jeopardize your reemployment rights if you do not report for work at the beginning of your next regularly scheduled working period after you have returned to your place of employment.

Willful failure to report at the place and hour of the day named in this Order subjects the violator to fine and imprisonment. Bring this Order with you when you report.

If you are so far from your own local board that reporting in compliance with this Order will be a serious hardship, go immediately to any local board and make written request for transfer of your delivery for induction, taking this Order with you.

SSS Form 252 (Revised 4-28-65) (Previous printings may be used until exhausted)

APPENDIX M.

Petitioner's Letter of May 30, 1968.

115 W. Davis St.
Yellow Springs, Ohio 45387
Thursday, 30 May 1968

Selective Service System
Local Board No. 25
Custom House, Rm. 131
Water and Gay Streets
Baltimore, Maryland 21202

Dear Sirs:

You have recently sent, and I have received, the following notices: (1) a Delinquency Notice, a Notice of Reclassification and an Advice of Right to Personal Appeal, all three dated 1 March, 1968; and (2) an Order to Report for Induction, dated 23 May 1968.

Please be advised of the following facts: (1) I am thirty years of age; (2) I am married; (3) I have three children; and (4) I am a teacher. On these and perhaps other grounds I am entitled by law to the classification (III-A) from which I was recently removed and reclassified I-A. My reclassification and subsequent induction are both therefore illegal, and do not bind. I shall preceed accordingly.

Please be advised also that my place of legal residence is Yellow Springs, Ohio, at the address given above. I should

therefore like my entire Selective Service System file transferred at once to the local board, at the following address:

Selective Service System
Local Board No. 47
30½ N. Detroit Street
Xenia, Ohio

Thank you very much for your attention to these pressing matters.

Very truly yours,

/S/ MICHAEL J. KRAUS

APPENDIX N

June 4, 1968

Mr. Michael J. Kraus
115 W. Davis St.
Yellow Springs, Ohio 45387

Dear Sir

In answer to your letter of May 30, 1968, please be advised that according to Selective Service Regulations, your file cannot be transferred to another Local Board.

If you will refer to your "Order to Report for Induction", last paragraph at the bottom of the form, you will find instructions for requesting transfer for Induction. When the Local Board in your area approves your request for transfer, the necessary forms for Induction will be mailed to them and you will report to the Local Board in Xenia, at their request instead of reporting to Baltimore, as originally ordered.

After you report for Induction, your papers will be returned to us and retained in your file at this Local Board.

For the Local Board
(Mrs.) Sara Steele, Secretary

SELECTIVE SERVICE SYSTEM
LOCAL BOARD NO. 25
JUN 4 1968
CUSTOM HOUSE-RM. 131, WATER & GAY STS.
BALTIMORE, MARYLAND 21202

APPENDIX O

[New York Times, Thursday, November 9, 1967]

Texts of Letter and Memo on the Draft

Special to The New York Times

Washington, *Nov. 8 Following is the text of a letter dated Oct. 26, to all members of the Selective Service system from the director of Selective Service Lieut. Gen. Lewis B. Hershey, and of a memorandum dated Oct. 24, from General Hershey on draft cards:*

The Letter

The basic purpose and the objective of the Selective Service system is the survival of the United States. The principal means used to that end is the military obligation placed by law upon all males of specified age groups. The complexities of the means of assuring survival are recognized by the broad authority for deferment from military service in the national health, safety or interest.

Important facts, too often forgotten or ignored, are that the military obligation for liable age groups is universal and that deferments are given only when they serve the national interest. It is obvious that any action that violates the military selective service act or the regulations or the related processes cannot be in the national interest.

It follows that those who violate them should be denied deferment in the national interest. It also follows that illegal activity which interferes with recruiting or causes refusal of duty in the military or naval forces could not by any stretch

of the examination be construed as being in support of the national interest.

The Selective Service system has always recognized that it was created to provide registrants for the armed forces, rather than to secure their punishment for disobedience of the act and regulations. There occasionally will be registrants, however, who will refuse to comply with their legal responsibilities or who will fail to report as ordered, or refuse to be inducted. For these registrants, prosecution in the courts of the United States must follow with promptness and effectiveness. All members of the Selective Service system must give every possible assistance to every law enforcement agency and especially to United States attorneys.

It is to be hoped that misguided registrants will recognize the long-range significance of accepting their obligations now rather than hereafter regretting their actions performed under unfortunate influences of misdirected emotions or possibly honest but wholly illegal advice, or even completely vicious efforts to cripple, if not to destroy, the unity vital to the existence of a nation and the preservation of the liberties of each of our citizens.

Demonstrations, when they become illegal, have produced and will continue to produce much evidence that relates to the basis for classification and, in some instances, even to violation of the act and regulations. Any material of this nature received in national headquarters or any other element of the system should be sent to state directors for forwarding to appropriate local boards for their consideration.

A local board, upon receipt of this information, may reopen the classification of the registrant, classify him anew,

and if evidence of violation of the act and regulations is established, also to declare the registrant to be a delinquent and to process him accordingly. This should include all registrants with remaining liability up to 35 years of age.

If the United States Attorney should desire to prosecute before the local board has ordered the registrant for induction, full cooperation will be given him and developments in the case should be reported to the state director and by him to national headquarters.

Evidence received from any source indicating efforts by nonregistrants to prevent induction or in any way interfere illegally with the operation of the Military Selective Service Act or with recruiting or its related processes, will be reported in as great detail as facts are available to state headquarters and national headquarters so that they may be made available to United States attorneys.

Registrants presently in classes IV-F or I-Y who have already been reported for delinquency, if they are found still to be delinquent, should again be ordered to report for physical examination to ascertain whether they may be acceptable in the light of current circumstances.

All elements of the Selective Service system are urged to expedite responsive classification and the processing of delinquents to the greatest possible extent consistent with sound procedure.

Memorandum

Subject: Disposition of Abandoned or Mutilated Registration Certificate and Notices of Classification.

1. Whenever an abandoned or mutilated registration certificate or current notice of classification reaches a local board, and the card was originally issued to a registrant by some other board, it should be forwarded to the state director of selective service, who will forward it to the appropriate local board if within the state, or the appropriate state director if the board of origin is outside the state.

2. Whenever a local board receives an abandoned or mutilated registration certificate or current notice of classification which had been issued to one of its own registrants, the following action is recommended:

(A) Declare the registrant to be delinquent for failure to have the card in his possession.

(B) Reclassify the registrant into a class available for service as a delinquent.

(C) At the expiration of the time for taking an appeal, if no appeal has been taken, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States attorney for prosecution.

(D) If appeal is taken and the registrant is retained in a class available for service by the appeal board, and the delinquency has not been removed, order the registrant to report for induction or for civilian work in lieu of induction if in Class I-O, as a delinquent, or in the board's discretion in a flagrant case, report him to the United States Attorney for prosecution.